IN THE

Supreme Court of the United States

October Term, 1977.

No. 77-239

MARSHALLTON-McKEAN SCHOOL DISTRICT,
Petitioner,

v.

BRENDA EVANS, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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Petitioner Marshallton-McKean School District respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW.

The majority and dissenting opinions of the Court of Appeals for the Third Circuit are not yet reported. They are reprinted as Appendix A to the petition for a writ of certiorari by the Delaware State Board of Education filed with this Court in this case (Docket No. *77-131*). The majority and dissenting opinions of the United States District Court for the District of Delaware are reported at 416 F. Supp. 328 (1976). They are reprinted as Appendix B to the petition for a writ of certiorari by the State Board of Education filed with this Court in this case.[1]

1. The Appendix of the Delaware State Board of Education is hereby incorporated by reference as the Appendix to the Petition of the Marshallton-McKean School District.

JURISDICTION.

The judgment of the Court of Appeals was entered on May 18, 1977. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether the Court of Appeals erred in affirming a district court interdistrict remedy order, as modified, without passing on the validity of the district court's findings of an interdistrict constitutional violation or violations.

2. Whether the Court of Appeals erred in affirming a district court interdistrict remedy order, as modified, based on the district court's finding of a constitutional violation solely on the basis of a law's supposed racially discriminatory effect and despite the absence of a finding of a racially discriminatory purpose.

3. Whether the Court of Appeals erred in affirming a district court interdistrict remedy order, as modified, based in part on the district court's finding of an interdistrict violation on the basis of alleged acts of racial discrimination in housing by private persons and public officials other than school authorities and on acts of school authorities not shown to have an interdistrict effect or a racially discriminatory purpose.

4. Whether the Court of Appeals erred in affirming, as modified, the district court's order requiring an interdistrict school desegregation remedy not limited to correcting the effects of the constitutional violation or violations found.

5. Whether the district court's interdistrict remedy order, as modified by the court of appeals, violates the Equal Educational Opportunity Act of 1974.

STATEMENT OF THE CASE.

The present phase of this case began in 1971 with the filing of a petition by a group of black students in the Wilmington, Delaware, School District claiming to represent the class of all such students and alleging the unconstitutional segregation of blacks in the Wilmington schools. The State Board of Education and State Superintendent of Education were named as defendants; the Wilmington Board of Education was permitted to intervene as a party plaintiff. The petitioners invoked the continuing jurisdiction of the District Court under a case brought by other plaintiffs in a rural school district in southern Delaware in 1956. Additional plaintiffs from other school districts were permitted to intervene in the 1956 litigation, and it proceeded as a class action purporting to involve the entire state. The 1956 litigation resulted in 1961 in a statewide desegregation plan requiring the elimination of all dual school systems in the state and the establishment of thirty unitary systems. *Evans v. Buchanan,* 195 F. Supp. 321 (D. Del. 1961).

Desegregation began in New Castle County, the northernmost of Delaware's three counties, which includes Wilmington, promptly after *Brown v. Board of Education,* 347 U. S. 483 (1954). The Court of Appeals for the Third Circuit noted in 1958 that "there was prompt compliance" with *Brown* in New Castle County, *Evans v. Buchanan,* 256 F. 2d 688, 690, and noted in 1961 that Delaware has "already . . . integrated many of its schools, particularly in the Wilmington metropolitan area", *Evans v. Ennis,* 281 F. 2d 385, 393.[2]

2. Indeed, desegregation began in northern Delaware even prior to *Brown* as the result of *Belton v. Gebhart,* 87 A. 2d 862 (Del. Ch.), *aff'd,* 91 A. 2d 137 (Del. Super. 1952), *aff'd sub nom. Brown v. Board of Education,* 347 U. S. 483 (1954).

This case, therefore, unlike *Green v. County School Board,* 391 U. S. 483 (1968), does not involve school districts defiant of or recalcitrant in complying with constitutional requirements or court orders. Indeed, by 1967 the Department of Health, Education, and Welfare was able to commend Delaware as the first border state which had "completely eradicated the dual system" *Evans v. Buchanan,* 393 F. Supp. 428, 451 (D. Del. 1975) (dissenting opinion).

From 1961 to 1971, when the present litigation began, the case lay dormant except for an attendance boundary dispute in one school district that was decided in 1962, *Evans v. Buchanan,* 207 F. Supp. 820 (D. Del. 1962). In the interim, however, Wilmington, like nearly all northern cities, experienced a rapid growth in black population and decline in white population. Between 1954 and 1973, the Wilmington School District had a growth in the number of black students from 3,572 to 12,141, and a decline in the number of white students from 9,303 to 3,556, with the result that the percentage of black enrollment increased from 28 percent to 83 percent. It is this fact of predominantly black Wilmington schools, resulting from population movements not significantly attributable to any acts of racial discrimination by school authorities, that is, we submit, the essential basis of plaintiffs' complaint.

The educational history of Delaware is largely a history of the consolidation of small school districts into larger ones. Early in the nineteenth century, the educational system of Delaware consisted of some 425 "educational republics", *Evans v. Buchanan,* 256 F. 2d 688, 693 (3d Cir. 1956). In 1829 the number of school districts was reduced to 195, and further consolidation, particularly in rural southern Delaware, took place over the years. The Wilmington School District has historically been the larg-

est, wealthiest, and most independent in the state. It was created in 1852 by the consolidation of the then nine school districts in the City of Wilmington. 10 Del. Laws 644. In 1905 the boundaries of the district were defined by state statute as coterminous with those of the city (23 Del. Laws 92), continuing a situation that had then existed for over fifty years. This unique statutory definition of the district has continued in every amendment of Delaware school law. 32 Del. Laws 163 (1921); 37 Del. Laws 202 (1931); 55 Del. Laws 172 (1965); 56 Del. Laws 292 (1968).

The consolidation of small, inefficient school districts in Delaware was continued by adoption of the Educational Advancement Act of 1968 (EAA), 56 Del. Laws 292, 14 Del. C. § 1001 *et seq*. The purpose of the EAA was "to provide the framework for an effective and orderly reorganization of the existing school districts of the State through the retention of certain existing school districts and the combination of other existing school districts". 14 Del. C. § 1001. The State Board of Education was required, pursuant to a given timetable and specific criteria, to plan the consolidation of contiguous school districts, submit the plan to the local boards of education involved, and to receive and pass on any objections. The present case turns in essence on two of the criteria specified in the Act. Section 1004(c)(2) provided that consolidated school districts were to have an enrollment of not less than 1,900 students and not more than 12,000. This upper limit, consistent with the historic Delaware concern for local control over public education, effectively excluded the Wilmington School District (with some 15,000 students) as well as the Newark and Alfred I. DuPont School Districts, also in New Castle County, from consolidation (consolidation of Newark or Alfred I. DuPont with any contiguous district would have resulted in an enrollment of over 12,000).

Section 1004(c)(4) of the EAA incorporated the statutory language originally adopted in 1905 and thereafter repeatedly readopted, providing that the Wilmington School District would be coterminous with the City of Wilmington. Because of the maximum size limitation of Section 1004(c)(2), this reaffirmation of the historic treatment of Wilmington was surplusage for the purposes of the Act, but was included because of a concern by the Delaware legislature that a question might otherwise arise under the Delaware Constitution. A change in the Delaware Constitution would have required a two-thirds affirmative vote of the legislature, which vote, because of opposition to school district consolidation in southern Delaware, could not be obtained—a crucial amendment in the passage of the EAA was adopted by a single vote. The EAA was supported by all Wilmington legislators, black and white; indeed, a black Wilmington representative was one of its sponsors.

Because the 1971 petition beginning this action challenged the constitutionality of the EAA, a three-judge district court was convened. The court declined to hold that the EAA was unconstitutional, but, nonetheless, concluded that the presence of "identifiably black" schools in Wilmington "is a clear indication that segregated schooling in Wilmington has never been eliminated and that there still exists a dual school system." *Evans v. Buchanan,* 379 F. Supp. 1218, 1223 (D. Del. 1974). Despite the absence of any finding of an interdistrict violation, the court, apparently believing such finding unnecessary, ordered the State Board to submit an interdistrict as well as an intradistrict (Wilmington only) plan. Shortly thereafter, however, this Court decided *Milliken v. Bradley,* 418 U. S. 717 (1974), holding that an interdistrict plan may not be ordered in the absence of an interdistrict violation. The

district court therefore postponed the submission of plans, and, reversing an earlier ruling, permitted the New Castle County school districts other than Wilmington (which was already a party) to intervene, which all other than a county-wide vocational district, then did.

After further briefing and argument, the district court issued another opinion and order. Recognizing that an interdistrict remedy requires a finding of an interdistrict violation, the court found that "during the period before *Brown I*, there was substantial interdependence of the Wilmington and suburban school systems," because some suburban [3] students, black and white, had attended Wilmington schools. *Evans v. Buchanan*, 393 F. Supp. 428, 433 (1975). The court also discussed alleged acts of racial discrimination relating to housing, the use of optional attendance zones in Wilmington, and state subsidization of interdistrict transportation of students to private schools. *Id.* at 434-437. The court made no finding, however, of any post-*Brown* act by school authorities taken with a racially discriminatory purpose. Finally, and all-importantly in light of the remedy it was later to order, the court found that the EAA was unconstitutional by reason of the exclusion of Wilmington from its operation and that this established an interdistrict violation. The court did not find, however, that the EAA was adopted for a racially discriminatory purpose. On the contrary, it found:

> We cannot conclude . . . that the provisions excluding the Wilmington District from school reorganization were purposefully racially discriminatory. . . . In short, the record does not demonstrate that a significant purpose of the Educational Advancement Act

3. It should be noted that many of the cities and areas subject to the district court's order are not in fact suburbs of Wilmington, but are separate cities with suburban areas of their own.

> was to foster or perpetuate discrimination through school reorganization.

Id. at 439. The court explicitly held the EAA unconstitutional solely because of its supposed racial effect—although, as will be shown below, the Act had no such effect. The court again ordered the submission of intradistrict and interdistrict plans. On appeal by defendants from this interlocutory order—no hearings having yet been held and no decision made on the question of remedy—this Court, *per curiam*, summarily affirmed, three members dissenting on jurisdictional grounds. *Buchanan v. Evans*, 423 U. S. 963 (1975).

The district court then held hearings on the question of remedy, and on June 15, 1976 rendered its final judgment. In essence, the court ordered the consolidation of eleven independent school districts into a single school district covering more than 250 square miles, involving several of the largest cities in Delaware as well as suburban and rural areas, and enrolling more than 60 percent of the public school children of Delaware. In addition, the court held that within this entire area each school and each grade in each school was to have a student population of no less than 10 percent or more than 35 percent black in order to be considered "*prima facie* desegregated." App. A84.[4] Defendants filed a notice of appeal to this Court and a protective appeal to the Court of Appeals for the Third Circuit. The appeal to this Court was dismissed for lack of jurisdiction. *State Board of Education v. Evans*, 45 U. S. L. W. 3394 (Nov. 29, 1976). Defendants then prosecuted their appeal to the Third Circuit.

Defendants find themselves in something of a "Catch-22" situation. This Court has determined that it lacks

4. Appendix References ("App. —") are to the appendix of the Delaware State Board of Education.

jurisdiction to review the district court's final judgment, leaving defendants to seek review in the court of appeals; the court of appeals, however, has in effect declined to review the district court's judgment on the ground that it has been precluded from doing so by this Court, stating that defendants "should take, or perhaps previously should have taken,[5] appropriate steps to obtain review of this matter, or clarification, by the Supreme Court." App. A13. The court of appeals, sitting *en banc* and by a four to three decision, determined that the district court had found no less than *eight* interdistrict constitutional violations and that this Court must have affirmed "one or more" of them. App. A14. Without identifying this violation or violations, the Court of Appeals majority thereupon affirmed the district court's order except that it deleted the district court's racial percentages for determining "*prima facie* desegregated" schools and classrooms. App. A19. The result is that defendants have been placed in the impossible position of being required to a remedy constitutional violation or violations, to the extent of consolidating or otherwise reorganizing eleven independent school districts, without being told what those violations are or what are the effects, if any, of those violations. As Judge Garth stated for himself and two other dissenting judges in the court of appeals,

> The modified order which the majority has affirmed commands Delaware officials to "desegregate" the schools of northern New Castle County "in accordance with the Opinion of the Court of Appeals for the Third Circuit. . . ." But neither the modified order nor the majority opinion reveals what "desegregation" requires in this case. Neither addresses the following

5. The State Board did in fact apply for rehearing before this Court.

two critical issues: 1. what are the interdistrict violations, if any, with which we are concerned and 2. what effects, if any, do those violations now have on the racial composition of the schools of northern New Castle County?

• • •

I must confess that if I were a Delaware official charged with desegregating the schools of northern New Castle County "in accordance with the Opinion of the Court of Appeals for the Third Circuit," I would not know where to begin.

• • •

I do not understand how the Delaware officials can possibly devise a plan to remedy the continuing effects of past interdistrict violations when the majority has failed to disclosed the identity of the violations which the Supreme Court affirmed.

Even if it is assumed *arguendo* that *all* eight interdistrict violations have been properly established, the Delaware officials would still be unable to determine what "desegregation" means in the context of this case until the courts determine what the continuing effects of those violations are.

• • •

In this case, however, the district court never attempted to ascertain what the racial composition of the schools of northern New Castle County would be but for the constitutional violations which it identified.

App. A24-29.

REASONS FOR GRANTING THE WRIT.

Petitioners seek review of a court of appeals decision that would require the consolidation or reorganization of eleven independent school districts, involving some of the largest cities in Delaware and over 60 percent of Delaware's public school children. To the people of Delaware, there has perhaps been no more important case in the history of the state. Because it involves determination of the basis and limits of the authority of federal courts to order the restructuring of school systems on an interdistrict basis, the case is also of great national importance. There can be little doubt that the decisions of the district court, both in regard to finding an interdistrict constitutional violation and in regard to the interdistrict remedy required, are directly in conflict with the applicable decisions of this Court.

On petitioners' appeal from the district court's order, the Court of Appeals for the Third Circuit, sitting *en banc*, divided four to three. The majority of the court did not hold, and could not have held, that the district court's findings of interdistrict constitutional violations were not in conflict with the decisions of this Court. The majority, instead, simply declined to pass on the basic constitutional questions involved, concluding that it was precluded from doing so because of this Court's summary *per curiam* affirmance of an earlier district court decision in the case. The majority in effect remitted petitioners' appeal to this Court, advising that petitioners' take "appropriate steps to obtain review of this matter, or clarification, by the Supreme Court." App. A13. The result is that petitioners have never obtained meaningful appellate review of a district court decision that is of the greatest importance and that is undoubtedly incorrect as a matter of law.

As the three dissenting judges of the court of appeals recognized, the result is also to place petitioners in an impossible position of being required to "devise a plan to remedy the continuing effects of past interdistrict violations when the majority has failed to disclose the identity of the violations. . . ." App. A28. Finally, as the three dissenting judges also recognized (App. A30), the court of appeals decision, if allowed to stand, will almost certainly result in the further prolongation of this already enormously protracted litigation, to the benefit of no one and to the detriment of more than half of the school children of Delaware. A set of circumstances more strongly supporting grant of review by this court would be, we submit, difficult to imagine.

I. The Court of Appeals Erred in Affirming, as Modified, the District Court's Remedy Order Without Identifying or Passing Upon the Validity of the Constitutional Violations Found by the District Court.

Petitioners urged the court of appeals to reverse the district court's remedy order on the ground that the district court clearly erred, first, in its findings of constitutional violations—for example and most important, in finding an interdistrict violation on the basis of the adoption of the Educational Advancement Act of 1968 despite the absence of a finding of a racially discriminatory purpose—and, second, in ordering a remedy not limited to correcting the effects of the violations found. The court of appeals passed on neither of these contentions. It held that it was precluded from passing on the validity of the district court's violation findings because of this Court's summary *per curiam* affirmance, *Buchanan v. Evans*, 423 U. S. 963 (1975), of the district court's 1975 liability decision requiring submission of both intradistrict and interdistrict

plans. Although it affirmed the district court's remedy order, as modified, the court of appeals' failure to pass on the validity of the district court's violation findings necessarily disabled it from determining whether the remedy order was properly limited in scope.

The court of appeals stated:

> Under the rule of *Hicks v. Miranda*, 422 U. S. 332, 344-45 (1975), lower courts, being bound by summary decisions of the United States Supreme Court, may not reexamine constitutional questions necessarily decided in a summary affirmance. In cases of summary adjudication, of course, it is not always crystal clear what exactly was adjudicated by the Supreme Court, see *Super Tire Engineering Co. v. McCorkle*, – F. 2d – [550 F. 2d 903] (3d Cir. No. 76-1869, Feb. 25, 1977, Slip Op. at 7), but in this case we conclude that the Supreme Court affirmed the finding of one or more inter-district constitutional violations.

App. A12.

The court of appeals apparently determined that the district court had found no less than eight interdistrict violations. App. 27-28. Having concluded that this Court must have affirmed "one or more" of these district court findings, the court of appeals declared itself unable to determine which one or ones had been affirmed, and, therefore, declined to pass on the validity of any. Petitioners were advised to take "appropriate steps to obtain review of this matter, or a clarification, by the Supreme Court." *Id.* The result was to deny petitioners appellate review of a district court decision of the utmost importance and that, as will be shown below, is clearly erroneous as a matter of law both on the question of violation and on the question of remedy. As the dissenting

judges pointed out, the result is also to place petitioners in the impossible position of being required to "devise a plan to remedy the continuing effects of past interdistrict violations when the majority has failed to disclosed the identity of the violations. . . ." App. A28.

The court of appeals has clearly erred in interpreting this Court's 1975 summary *per curiam* decision as requiring this bizarre result. The court was undoubtedly correct that a lower court ordinarily "may not reexamine constitutional questions necessarily decided in a summary affirmance", but this, of course, leaves unanswered the question of what was necessarily decided. As Chief Justice Burger pointed out, concurring in *Fusari v. Steinberg*, 419 U. S. 379, 391 (1975), "When we summarily affirm without opinion the judgment of a three-judge District Court, we affirm the judgment but not necessarily the reasoning by which it was reached." This Court's affirmance did not necessarily decide—and its later decisions make clear that it could not have decided—that for example, the district court did not err in holding the EAA unconstitutional solely on the basis of its supposed racial effect and despite the absence of a racially discriminatory purpose.

The only substantive question before this Court in 1975 was whether the district court had erred as a matter of law in requiring the submission of both intradistrict (Wilmington only) and interdistrict desegregation plans. Because the district court had found that the admitted pre-*Brown* segregation of Wilmington schools had not been completely remedied, the requirement of an intradistrict plan was clearly justified. The district court had also found, as the three members of this court who wrote an opinion dissenting on jurisdictional grounds noted: "(1) A percentage of suburban students of both races had,

pre-*Brown*, traveled into the city to attend segregated schools in Wilmington." 423 U. S. at 972 n. 7. Because this pre-*Brown* interdistrict transfer of students to segregated schools was also undenied there clearly existed a justification for the district court also to consider an interdistrict plan to remedy the continuing effects, if any, of this pre-*Brown* interdistrict violation. The district court had carefully stated that its request for an interdistrict as well as an intradistrict plan did not mean that the case would "necessarily end in some form of interdistrict busing of students, both into and out of Wilmington." 393 F. Supp. at 446 n. 37. This Court's summary affirmance of the district court's 1975 decision did not necessarily hold more than that, given the pre-*Brown* interdistrict violation, submission of an interdistrict as well as an intradistrict plan was justified pending determination by the district court of the continuing effects, if any, of that violation. This Court had no occasion to consider, and certainly did not affirm the validity of, the district court's findings as to any interdistrict violation after the time of *Brown*. The court of appeals, therefore, was not precluded from considering the validity of those findings after the district court had made its remedy decision. Indeed, the court of appeals was clearly required to consider the validity of those findings because, as the dissenting court of appeals judges pointed out, it could not otherwise pass on the validity of the interdistrict remedy the district court had ordered.

That this Court's prior decision in this case did not preclude the court of appeals from considering the validity of the post-*Brown* interdistrict constitutional violations found or supposedly found by the district court is sufficiently demonstrated by the fact that those findings are plainly inconsistent with the applicable decisions of this court. This Court most certainly did not hold in 1975 that

the constitutional principles applicable elsewhere in the country are not applicable in Delaware.

II. The Court of Appeals Erred in Failing to Reverse the District Court's Finding of an Interdistrict Constitutional Violation on the Basis of the Adoption of the Educational Advancement Act of 1968 Solely Because of the Act's Supposed Racial Effect and Despite a Finding That the Act Was Not Shown to Have a Racially Discriminatory Purpose.

Despite the procedural complexity this case has now assumed, it turns in essence on a single question, the answer to which cannot seriously be in doubt: the constitutionality of the Educational Advancement Act of 1968 (EAA). The district court's holding that the EAA is unconstitutional is the keystone of both its liability and its remedy decisions. Except for that holding there would simply now be no question of requiring the consolidation or reorganization of eleven independent school districts in New Castle County. Decisions of this Court subsequent to the district court's holding on the EAA have made clear, however, that that holding is incorrect as a matter of law. The court of appeals erred, therefore, in affirming the district court's order, as modified, even if the court of appeals could have found that the district court's rulings on liability and remedy were incorrect in no other respect.

The EAA was adopted "to provide the framework for an effective and orderly reorganization of the existing school districts of the State through the retention of certain existing school districts and the combination of other existing school districts." 14 *Del. C.* § 1001. Pursuant to criteria set forth in the Act, the State Board of Education, in consultation with local boards, was to develop a plan for the consolidation of contiguous school districts. The focus

of the Act, as the district court noted, was "on small, weak, inefficient school districts (393 F. Supp. at 439) which districts were located primarily in the southern portion of the State. Seeking to maintain, at least to some extent, the Delaware tradition of relatively small school districts subject to effective popular supervision and control, the Act (14 *Del. C.* § 1004(c)(2)) provided that no reconstituted district was to have an enrollment of more than 12,000 students (or less than 1900). This provision, of course, effectively excluded the Wilmington School District (as well as the Newark and Alfred I. DuPont School Districts in New Castle County) from the operation of the Act.[6]

The Wilmington School District was also excluded from the operation of the Act by Section 1004(c)(4). This section re-enacted statutory language going back to 1905 (and carried forward in legislation of 1921, 32 *Del. L.* 163; 1931, 37 *Del. L.* 202; and 1965, 55 *Del. L.* 172) that "The proposed school district for the City of Wilmington shall be the City of Wilmington with the territory within its limits". This was done not only to make explicit the desire to continue the historically distinct treatment of Wilmington but also, as the district court found, because the drafters of the Act "believed that under the Delaware Constitution no statute could alter the boundaries of the Wilmington School District unless passed by a two-thirds majority of each House of the General Assembly (393 F. Supp. at 443) and such a majority was not obtainable.

The district court held that the exclusion of the Wilmington School District from the operation of the EAA violated the Equal Protection Clause of the Constitution

6. The Wilmington School District was the largest and wealthiest school district in the state. It had an enrollment of about 15,000 students, and its expenditure of local funds per pupil was more than double the expenditure of, for example, that of the Newark School District, with which Wilmington is most nearly comparable in size.

and, therefore, established unconstitutional interdistrict segregation requiring an interdistrict remedy. There can be no question as to the basis of this holding. The court explicitly stated "We cannot conclude, as plaintiffs contend, that the provisions excluding the Wilmington District from school reorganization were purposefully racially discriminatory." 393 F. Supp. at 439. It found that "the record does not demonstrate that a significant purpose of the Educational Advancement Act was to foster or perpetuate discrimination through school reorganization." *Id.* In the district court's view of the applicable law, however, "Effective as well as intentional racial classifications . . . require special scrutiny under the Equal Protection Clause". *Id.* The court explicitly held the Act unconstitutional because it, though "racially neutral on its face, had a significant racial impact on the policies of the State Board of Education". *Id.* at 442-43. The exclusion of the Wilmington School District from the Act constituted, the court said, a "suspect racial classification" which was unjustifiable under the "compelling interest" standard and, therefore, a constitutional violation. This constitutional violation, the court concluded, "plainly constitutes an 'interdistrict violation' under *Milliken v. Bradley,*" 418 U. S. 717 (1974), because "But for this racial classification, the Board may have consolidated Wilmington with other New Castle County districts, with the result that the racial proportions of the districts would have been altered significantly". *Id.* at 445.

The district court's reasoning and conclusion as to the EAA are mistaken in every respect. First, the exclusion of the Wilmington School District from the operation of the Act plainly did not have a racially discriminatory or segregative effect.

The district court's finding that the EAA was unconstitutional focuses on Section 1004(c)(4) which ex-

plicitly excluded the Wilmington School District from the operation of the Act. That section was in fact superfluous for that purpose because the Wilmington School District, with an enrollment of about 15,000, was excluded in any event by reason of Section 1004(c)(2) which limited consolidated districts to a student enrollment of no more than 12,000. In any event, Section 1004(c)(2) and Section 1004(c)(4), whether considered separately or together, could not have properly been found to have a racially discriminatory effect because there is no evidence in the record that the State Board of Education would have ordered the consolidation of the Wilmington School District with any other district except for those sections; indeed, it is clear that the State Board would not have ordered such consolidation. The district court conceded that a decision not to create a district with an enrollment of more than 12,000 would be "certainly rational". 393 F. Supp. at 445. The purpose of the Act was, after all, to improve small, weak, and inefficient school districts, and the Wilmington School District, as the court found (*Id.* at 439), was not one of these. "Moreover," as the court also found, "Wilmington had historically been treated distinctively in Delaware education, and there is evidence that its representatives were unwilling to forego certain aspects of this special treatment". *Id.* In fact (and virtually conclusive in itself on the question of discriminatory purpose, which will be considered next) the exclusion of Wilmington from the EAA was supported by all Wilmington representatives, both black and white, in the state legislature. *Id.*

In short, the district court's conclusion that the exclusion of the Wilmington School District from the EAA had a racially discriminatory effect is simply baseless. The court's objection to the Act seems to be that it did not

require the consolidation of the Wilmington School District with other districts so as to "improve" the racial balance of the Wilmington schools. As the dissenting Court of Appeals judges noted, the district court "appears to have proceeded on the assumption" that it was authorized to seek "to achieve a particular degree of racial balance thought to be socially or educationally desirable." App. A29. There can be no doubt, however, that the failure of state authorities to act to increase school racial balance does not provide a basis for federal courts to do so. As Chief Justice Burger stated for a unanimous Court in *Swann v. Charlotte-Mecklenburg*, 402 U. S. 1, 16 (1971), school authorities may voluntarily act to increase school racial balance, but "absent a finding of a constitutional violation, . . . that would not be within the authority of a federal court. As with any equity case, the nature of the violation determines the scope of the remedy".

Second, even if the Act could somehow have properly been found to have had a racially discriminatory effect, the district court erred as a matter of law in holding it unconstitutional on that ground alone and despite its finding that no discriminatory purpose had been shown. If there was any doubt at the time of the district court's decision that a discriminatory effect does not establish a violation of the Equal Protection Clause in the absence of a showing of discriminatory purpose, that doubt has been removed by the subsequent decisions of this Court in *Washington v. Davis*, 426 U. S. 229 (1976), and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 45 U. S. L. W. 4073 (Jan. 11, 1977). *Washington v. Davis* involved a challenge to the use of a qualifying test for applicants for police officer positions in the District of Columbia. Plaintiffs claimed that the test should be held racially discriminatory because it operated to exclude a

greater proportion of blacks than whites. Upholding the use of the test despite this undeniable effect, Justice White stated for the Court, "But our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact." 426 U. S. at 239. Specifically addressing himself to the present problem, Justice White continued:

> "The school desegregation cases have also adhered to the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose. That there are both predominantly black and predominantly white schools in a community is not alone violative of the Equal Protection Clause".

Id. at 240. The conflict between the district court's decision and this Court's decision in *Washington v. Davis* is further demonstrated by this Court's express disapproval (*Id.* at 245 and n. 12) of several of the cases relied on by the district court. 393 F. Supp. at 441.

In *Village of Arlington Heights, supra,* this Court reiterated: "Proof of racial discriminatory intent or purpose is required to show a violation of the Equal Protection Clause". 45 U. S. L. W. 4077. See also, *Austin Independent School District v. United States,* 45 U. S. L. W. 3413 (Dec. 8, 1976), vacating and remanding for reconsideration in light of *Washington v. Davis* a court of appeals decision that in effect invalidated the use of a neighborhood school policy in racially imbalanced neighborhoods because of the policy's inevitable racial effect; *Metropolitan School District v. Buckley,* 45 U. S. L. W. 3505 (Jan. 17, 1977); *Omaha School District v. United States,* 45 U. S. L. W. 3850 (June 29, 1977); *Brennan v. Armstrong,* 45 U. S. L. W. 3850 (June 29, 1977).

In sum, the Wilmington School District was excluded from the operation of the EAA by Section 1004(c)(2) only because it was not a small, weak, or inefficient district in need of consolidation with any other district, and by Section 1004 (c)(4) only for historic reasons and to avoid a constitutional question under the Delaware Constitution. In any event, the district court's conclusion that the record does not show a racially discriminatory purpose in the adoption of the Act establishes that the district court's essential finding of an interdistrict constitutional violation on the basis of the Act is mistaken as a matter of law and that the court of appeals' affirmance of the district court's remedy order, based on that finding, must be reversed.

III. The Court of Appeals Erred in Failing to Reverse the District Court's Supposed Findings of Interdistrict Constitutional Violations on the Basis of Acts That Were Not the Responsibility of School Authorities or That Were Not Shown to Have an Interdistrict Effect or a Racially Discriminatory Purpose.

Although the district court's finding of a post-*Brown* interdistrict violation rests essentially, if not exclusively, on its invalidation of the EAA, the court's liability opinion includes brief references to several other matters, mostly having to do with housing, as possible additional bases for finding interdistrict violations. The opinion of the dissenting court of appeals judges states:

> [T]he district court identified *eight* separate interdistrict violations, *viz.*, 1. the enactment of Educational Advancement Act of 1968 [EAA], 2. the location of public housing projects, 3. state subsidies for the interdistrict transportation of students attending private schools, 4. the establishment by the Wilmington school board of optional attendance zones, 5. the

> recordation of deeds containing racially restrictive covenants, 6. portions of the Federal Housing Administration's mortgage underwriting manual, 7. portions of the Delaware Real Estate Commission handbook, and 8. the interdistrict transportation of students attending all-black or all-white schools prior to *Brown v. Board of Education*, 347 U. S. 483 (1954).

App. A27, 28. The majority opinion apparently adopts this statement: "The dissent urges that we should determine which of the eight violations found by the district court were affirmed or not affirmed by the Supreme Court." App. A13. In fact, however, it is doubtful that the district court found *any* post-*Brown* interdistrict violation other than on the basis of the EAA. In any event, any such finding would, like the finding based on the EAA, be incorrect as a matter of law and would not support the district court's remedy order.

The district court's supposed additional findings of interdistrict constitutional violations will be considered in the order listed in the dissenting opinion in the court of appeals. The district court's liability opinion states that "Public housing policies also contributed to the concentration of minority residents in Wilmington." 393 F. Supp. at 435. The opinion notes that "While the Wilmington Housing Authority operates over 2,000 public housing units within the City of Wilmington, fewer than 40 units were established in the suburbs" and that attempts by the New Castle County Housing Authority, created in 1972, "to fund public housing developments at suburban sites have met vigorous opposition from neighborhood groups and have been unsuccessful in gaining the necessary rezoning or site approval from the New Castle County Council." *Id.* The court recognized that "there are many

legitimate objections to public housing developments", but concluded, "the fact remains that . . . virtually the only public housing units constructed were located in the City of Wilmington. The evident effect was to concentrate poor and minority families in Wilmington." *Id.* Apart from the fact that this finding is not based on the actions of school authorities, it plainly does not constitute a valid finding of unconstitutional segregation because it rests solely on the supposed racial effect of actions not found to be taken for a racially discriminatory purpose. *Washington v. Davis,* 426 U. S. 229 (1976). That a failure to obtain zoning changes or necessary site approvals that would lead to greater residential racial integration does not in itself establish a constitutional violation, much less unconstitutional interdistrict segregation, is the specific holding of *Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 45 U. S. L. W. 4073 (Jan. 11, 1977). Also squarely in point is this Court's decision in *Metropolitan School District v. Buckley,* 45 U. S. L. W. 3505 (Jan. 17, 1977), vacating and remanding a court of appeals decision that found an interdistrict violation on the basis, in part, of the placement of public housing.

The next matter referred to by the Court of Appeals as a basis on which the district court found an interdistrict violation is "state subsidies for the interdistrict transportation of students attending private schools." The district court's 1975 liability opinion does discuss this matter at some length, and concludes that the subsidy "undoubtedly served to augment the racial disparity between Wilmington and suburban public school populations." 393 F. Supp. at 437. The ambiguity and uncertainty of the district court's supposed findings of post-*Brown* interdistrict violations other than on the basis of the EAA is well illustrated, however, by the fact that the district court in its

later remedy opinion specifically refused to hold that the state's provision of transportation subsidies was unconstitutional. App. A99.

The next interdistrict violation that the Court of Appeals thought was found by the district court was "the establishment by the Wilmington school board of optional attendance zones". In its 1975 opinion, the district court stated that "certain policies of the Wilmington School Board, although possibly designed to minimize the flight of white families with school-aged children to the suburbs, may have had the opposite effect. The record indicates that optional attendance zones established by the Wilmington School Board after 1954 in several instances allowed white students to attend schools in attendance areas other than those in which they resided." 393 F. Supp. at 435. The district court concluded that "To some extent . . . , discriminatory school policies in Wilmington may have affected the relative racial balance in housing and schools in Wilmington and the suburbs." *Id.* at 436. These statements clearly fail to constitute a valid finding of an interdistrict violation for several reasons. First, the creation of optional attendance zones in Wilmington was not shown or found to be racially discriminatory. Although the court stated that these zones "allowed white students" to attend other than their neighborhood schools, in fact they applied equally to whites and blacks and were not shown or found to have been adopted with a segregative intent. Second, the district court did not find that the optional attendance zones had an interdistrict racial effect, but only that they *may* have had such an effect. There is no evidence in the record to support even this speculative conclusion, and it is far more likely that the effect, if any, of the optional attendance zones in Wilmington was to induce whites to remain in Wilmington. Finally, a finding of racially dis-

criminatory attendance zones in one school district does not, in any event, provide a basis for ordering an interdistrict remedy, as is shown by this court's decision in *Milliken v. Bradley,* 418 U. S. 717 (1974), reversing an interdistrict remedy order based in part on such findings.

The remaining post-*Brown* interdistrict violations other than the EAA that the Court of Appeals believed were found by the district court concerned alleged acts of racial discrimination in regard to housing (items 5, 6, and 7 in the above quoted listing). None provides a basis for finding unconstitutional school segregation, much less interdistrict segregation. The enforcement of racially restrictive covenants ended, of course, in 1948 with this Court's decision in *Shelley v. Kraemer,* 334 U. S. 1 (1948); The Federal Housing Administration's use of the manual referred to by the district court ended, as the court found, in 1949; the Delaware Real Estate Commission handbook referred to merely reprinted the Code of Ethics of the National Association of Real Estate Boards which contained a provision referring to race. (See 393 F. Supp. at 434). None of the matters involved the action of school authorities; one, the FHA manual, did not even involve state authorities. The same or similar matters can be found in the history of virtually every area of the country, but they have never been held by this Court to provide a basis for finding unconstitutional school segregation, much less for finding unconstitutional interdistrict segregation. Precisely the same matters—"recording racial covenants, discriminatory FHA loan practices and private discrimination by brokers, sellers and others" *(United States v. Board of School Commissioners of City of Indianapolis,* 541 F. 2d 1211, 1228 n. 8 (1976)—were found, for example, in Indianapolis, but a court of appeals decision requiring an interdistrict remedy was nonetheless vacated

and remanded by this court, *Metropolitan School District v. Buckley*, 45 U. S. L. W. 3505 (Jan. 17, 1977).[7]

As this Court pointed out in *Swann v. Charlotte-Mecklenburg*, 402 U. S. 1, 22-23 (1971), the concern of school segregation cases is

> the elimination of the discrimination inherent in the dual school systems, not with myriad factors of human existence which can cause discrimination in a multitude of ways on racial, religious, or ethnic grounds. The target of the cases from *Brown I* to the present was the dual school system. The elimination of racial discrimination in public schools is a large task and one that should not be retarded by efforts to achieve broader purposes lying beyond the jurisdiction of school authorities. One vehicle can carry only a limited amount of baggage. It would not serve the important objective of *Brown I* to seek to use school desegregation cases for purposes beyond their scope, although desegregation of schools ultimately will have impact on other forms of discrimination.

The Court of Appeals clearly erred in holding that this Court's affirmance of the district court's 1975 liability decision can be interpreted as affirming the district court's

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7. As Judge Tone pointed out in his dissent from the court of appeals decision vacated by this Court, such matters were also found in Detroit:

> If these facts had sufficed to justify an interdistrict remedy, the Supreme Court in *Milliken* would presumably either have affirmed on the familiar principle that a reviewing court will affirm on any basis supported by the record, even if not relied on by the lower court, or else would have remanded for further consideration of the housing issue. See, *e.g.*, *Dandridge v. Williams*, 397 U. S. 471, 475 n. 6, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970).

United States v. Board of School Commissioners of City of Indianapolis, 541 F. 2d 1211, 1228 n. 8 (6th Cir. 1976).

supposed findings of an interdistrict constitutional violation or violations on the basis of the housing, attendance zone, and transportation matters referred to in the district court's 1975 opinion.

IV. The Court of Appeals Erred in Affirming, as Modified, an Interdistrict Remedy Order Not Limited to Correcting the Effects of the Constitutional Violation or Violations Found.

Whether or not the district court erred in finding an interdistrict constitutional violation on the basis of the EAA or otherwise, the court clearly erred, as a matter of law, in requiring a "remedy" not limited to correcting the effects of the violation or violations found, and, indeed, with no attempt to determine the effects, if any, of those violations. The Court of Appeals equally erred, therefore, in affirming the district court's order except as to the district court's requirement of specific racial quotas in each school and classroom.

This Court has now repeatedly made clear that federal courts have no authority to order the restructuring of school systems except on the basis of a proven constitutional violation and then only to the extent necessary to correct the effects of that violation. Federal courts may not require a "remedy" that goes beyond the constitutional violation found.

> [A] school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right. The task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution.
>
> In seeking to define even in broad and general terms how far this remedial power extends it is im-

> portant to remember that judicial powers may be exercised only on the basis of a constitutional violation.

Swann, supra, 402 U. S. 1, 15-16.

This Court reiterated in *Milliken, supra,* 418 U. S. at 744: "The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation". More precisely, "the remedy is necessarily designed, as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." *Id.* at 746; *Pasadena City Board of Education v. Spangler,* 427 U. S. 424 (1976). Thus, a remedial measure "is permissible only where the evidence supports a finding that the extent of integration sought to be achieved by [the measure] would have existed had the school authorities fulfilled their constitutional obligations in the past. Such a standard is remedial rather than punitive. . . . A remedy simply is not equitable if it is disproportionate to the wrong." *Austin Independent School District v. United States,* 45 U. S. L. W. 3413 (Dec. 8, 1976) (concurring opinion).

As most recently and specifically summarized by this Court in *Dayton Board of Education v. Brinkman,* 45 U. S. L. W. 4910, 4913-14:

> The power of the federal court to restructure the operation of local and state governmental entities is not plenary. It 'may be exercised only on the basis of a constitutional violation.' [*Milliken v. Bradley*], 418 U. S., at 738, quoting *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U. S. 1, 16. See *Rizzo v. Goode,* 423 U. S. 362, 377. Once a constitutional violation is found, a federal court is required to tailor 'the scope of the remedy' to fit 'the nature of the viola-

> tion.' 418 U. S., at 744; *Swann, supra,* at 16." *Hills,* [*v. Gautreaux,* 425 U. S. 284, 294 (1976)]. See also *Austin Independent School Dist. v. United States,* — U. S. — (1976) (MR. JUSTICE POWELL, concurring).
>
> The duty of both the District Court and of the Court of Appeals in a case such as this, where mandatory segregation by law of the races in the schools has long since ceased, is to first determine whether there was any action in the conduct of the business of the school board which was intended to, and did in fact, discriminate against minority pupils, teachers or staff. *Washington v. Davis, supra.* . . . If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy.

See also *Omaha School District v. United States, supra,* and *Brennan v. Armstrong, supra.*

The district court totally misunderstood or simply ignored the limitations on its equitable authority established by this Court's decisions. Having improperly found an interdistrict violation on the basis of the EAA or otherwise, the court simply ordered the consolidation of eleven independent school districts and the racial balancing of each school's student body within very narrow limits (10% to 35% black) based on the racial makeup of the student body of the entire eleven district area. The dis-

trict court ordered this total upheaval of school districts accounting for more than sixty percent of the student population of Delaware with no attempt to show that it was necessary to correct the constitutional violation or violations supposedly found or even to relate it to such violations except that the order was to be denominated a "remedy". As stated by the dissenting Court of Appeals judges

> the district court never attempted to ascertain what the racial composition of the schools of northern New Castle would be but for the constitutional violations which it identified. Instead, the district court appears to have proceeded upon the assumption that the proper remedial goal was to achieve a particular degree of racial balance thought to be socially or educationally desirable, *viz.*, 10% to 35% black students and 65% to 90% white students.

App. A29.

The district court's misunderstanding of the remedy requirement is illustrated by the remedy that it thought followed from its invalidation of the EAA: "Where one of the violations was the isolation of Wilmington from the possibility of union with other districts, *prima facie*, an appropriate remedy would be ordering of the union to take place", App. A-72. The court's conclusion is obviously a *non sequitur*. If the violation consisted of preventing the "possibility of union", the appropriate remedy, *prima facie*, should be the restoration of that possibility—a possibility that most assuredly would not have been realized and that would not now be realized. As the dissenting Court of Appeals judges pointed out:

> Since portions of the EAA were held to be discriminatory because they precluded the State Board of

> Education from *considering* the desirability of consolidating all or part of Wilmington with nearby districts, the defendants could quite reasonably take the position that the continuing effects of this violation can be remedied simply by requiring the State Board to *consider* whether it would be educationally desirable to consolidate Wilmington with nearby districts and by empowering the State Board to effect such consolidations if it determines that they are beneficial.

App. A30-31.

Further, the district court did not, in any event, order the union of the Wilmington School District and any adjacent district, which is all that would have been possible if the EAA had been applicable to Wilmington. The court, instead, simply ordered that the student body of each school and classroom in an eleven district area be made not less than 10 percent or more than 35 percent black, although the union of Wilmington with any adjacent district would have resulted in a district (which would have been the largest in the history of Delaware) with a student body from 45 percent to 67 percent black. There is no evidence in the record, no reason to believe, and the district court made no attempt to show that but for the EAA or any other supposed constitutional violation the schools of northern Delaware would have the racial proportions the district court ordered.[8] In fact, racial balance throughout an urban area, much less throughout a large urban-suburban area, occurs no where in the country. "[A] high degree of residential segregation based on race is a universal characteristic of American cities. This segregation is found in the cities of the North and West as well

8. The district court chose the 10 percent minimum only because a lower percentage of blacks "presents severe difficulties in the 'identity' of majority youngsters," and it chose the 35 percent maximum only because a larger percentage of blacks was "said to produce a substantial likelihood of white flight." App. A84.

as of the South; in large cities as well as small; in non-industrial cities as well as industrial; in cities with hundreds of thousands of Negro residents as well as those with only a few thousand, and in cities that are progressive in their employment practices and civil rights policies as well as those that are not." *Keyes v. School District No. 1, Denver, Colorado*, 413 U. S. 189, 223, n. 9 (concurring and dissenting opinion by Justice Powell, quoting population expert Dr. Karl Taeuber).

The majority opinion of the court of appeals states "we expressly disapprove the 10-35% enrollment criterion, and we specifically hold that no particular racial balance will be required in any school, grade, or classroom." App. A19. The opinion also states, however, "We affirm the basic concept of the remedy ordered by the district court" (*Id.*) and specifically requires that the eleven school districts of northern New Castle County "be reorganized into a new or such other new districts as shall be prescribed by the state legislature or the State Board of Education, so long as such prescription shall comply" with the majority's opinion. App. A21. The net result is to leave the parties and the district court completely without guidance as to what this reorganization is to accomplish. The schools of the giant new district must, to be sure, be "desegregated" App. A23, but to desegregate is to remedy the effects of constitutional violations, and the court of appeals has declined to determine what these violations are.

In any event, the Court of Appeals would have erred in ordering the consolidation of eleven school districts even if it had affirmed all of the eight interdistrict violations supposedly found by the district court. There is no evidence in the record and the court of appeals made no attempt to show that such consolidation would have taken place but for the violations found or that such consolida-

tion will make the racial distribution in the schools "what it would have been in the absence of such constitutional violations." *Dayton, supra,* 45 U. S. L. W. at 4914. It is clear, therefore, that, as in *Dayton,* "the Court of Appeals imposed a remedy . . . entirely out of proportion to the constitutional violations found by the District Court, taking those findings of violations in the light most favorable to respondents," and that "the presently mandated remedy cannot stand upon the basis of the violations found by the District Court." 45 U. S. L. W. at 4913.

V. The Remedy Ordered by the District Court and Affirmed by the Court of Appeals, as Modified, Violates the Equal Educational Opportunity Act of 1974.

In the Equal Educational Opportunity Act of 1974, 88 Stat. 514, 20 U. S. C. §§ 1701-68 (1976 Supp.), Congress declared as a matter of national policy that "the neighborhood is the appropriate basis for determining public school assignments." 20 U. S. C. § 1701(a)(2). In addition, Congress found:

> (3) the implementation of desegregation plans that require extensive student transportation has, in many cases, required local educational agencies to expend large amounts of funds, thereby depleting their financial resources available for the maintenance or improvement of the quality of educational facilities and instruction provided;
>
> (4) transportation of students which creates serious risks to their health and safety, disrupts the educational process carried out with respect to such students, and impinges significantly on their educational opportunity, is excessive;

> (5) the risks and harms created by excessive transportation are particularly great for children enrolled in the first six grades . . .

Id. § 1702(a)3-5.

> Section 213 of the Act (20 U. S. C. § 712) provides: In formulating a remedy for a denial of equal educational opportunity or a denial of the equal protection of the laws, a court, department or agency of the United States shall seek or impose only such remedies as are essential to correct particular denials of equal educational opportunity or equal protection of the laws.

The remedy ordered by the court of appeals is in clear conflict with this provision in that the court made no attempt to show that the remedy—the consolidation or reorganization of eleven independent school districts—is essential to correct the particular violation or violations supposedly found. Indeed, the court has failed to show that the remedy ordered is in any way limited to correcting the effects of those violations, and it plainly is not.

Finally, section 216 of the 1974 Act provides that in the formulation of remedies school district lines "shall not be ignored or altered except where it is established that the lines were drawn for the purpose, and had the effect, of segregating children among public schools on the basis of race, color, sex, or national origin." 20 U. S. C. 1715. The district court conceded that no purpose to segregate (racially discriminate) had been found in the adoption of the EAA, the court's essential or sole basis for finding an interdistrict violation and requiring the altering of school district lines. The court, however, thereupon held that a showing of "segregatory effects" was sufficient under the Act. App. A96. The result, of course, was simply to read

the purpose of requirement out of the Act despite the fact that the Act explicitly requires *both* purpose *and* effect. This, we submit, is not statutory construction but statutory demolition.

The Act does not purport to modify or diminish the authority of federal courts to enforce the Constitution. 20 U. S. C. § 1720(b). That fact does not mean, of course, that federal courts are authorized to ignore the Act or treat it as a nullity. Congress' declaration that the neighborhood is the appropriate basis for school assignment, its factual findings as to the financial costs, risks, and harms of busing, and its limitations on orders requiring the redrawing of school district lines are, at a minimum, entitled to deferential consideration by federal courts. It does not appear that such consideration has been given the Act by the courts below.

CONCLUSION.

The basic issue presented by this case, the limits on the power of federal courts to order the restructuring of school systems on an interdistrict basis, is one of paramount national importance. The decisions below are in clear conflict with the decisions of this Court both in regard to finding an interdistrict constitutional violation and in regard to ordering an interdistrict remedy. To permit the decision below to stand would be in effect to make inapplicable to Delaware settled constitutional principles applicable elsewhere in the nation. For the reasons set forth above, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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